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of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
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NOTICE

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U.S. Court of Appeals for the Federal Circuit

(Appeal No. 83-1028)

SIGMA INSTRUMENTS, INC., APPELLEE *v.* UNITED STATES, APPELLANT

(Decided: December 21, 1983)

Saul Davis, of New York, New York, argued for appellant. With him on the brief were *J. Paul McGrath*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge International Trade Field Office.

S. Richard Shostak, of Los Angeles, California, argued for appellee.

[Appealed from Court of International Trade Judge Newman.]

Before MARKEY, *Chief Judge*, DAVIS and BENNETT, *Circuit Judges*.

MARKEY, *Chief Judge*.

Appeal from a judgment of the Court of International Trade (CIT) holding Sigma Instruments, Inc. (Sigma) entitled to the duty allowance prescribed by item 807.00 of the Tariff Schedules of the United States (TSUS)[1] for certain terminal pins (terminals). We *affirm*.

BACKGROUND

The facts are fully set forth in an opinion accompanying the judgment appealed from. *Sigma Instruments, Inc.* v. *United States*, 565 F. Supp. 1036 (Ct. Int'l Trade 1983). Essentially, Sigma claimed duty allowance only for terminals. The terminals were shipped from the U.S. to Mexico where they were incorporated into header assemblies (headers) by a transfer molding process in which the terminals were aligned with slots in the lower half of a mold and a viscous molding compound was forced into the mold cavity. The molding compound hardened to retain the terminals in the desired spaced relationship. Some headers are incorporated in relays, and the headers and relays are imported into the United States.

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[1] Item 807.00 TSUS provides:

Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting.	A duty upon the full value of the imported article, less the cost or value of such products of the United States (see headnote 3 of this subpart).

OPINION

ISSUE

Whether the CIT correctly determined that the terminals were not advanced in value other than by "assembly" within the meaning of 807.00 TSUS.

Because no error appears, we affirm the appealed judgment on the basis of the opinion filed by Judge Newman.

The following responds to the arguments presented by the government on appeal.

In an effort to show error, the government argues: (1) the meaning of "assembly" as joining of solids should control, absent proof of contrary congressional intent; (2) legislative history and administrative regulation mandate that definition; (3) the decisions of the Court of Customs and Patent Appeals (CCPA) mandate that definition; (4) otherwise painting, clearly incidental to assembly under item 807.00, would be "assembly"; (5) the headers and relays are new and different articles; (6) absent its definition, *Firestone Tire & Rubber Co.* v. *United States,* 364 F. Supp. 1394 (Cust. Ct. 1973), would render item 807.00 superfluous; (7) there is no assembly because the molding compound does not adhesively join the terminals to each other; (8) transfer molding is not incidental to assembly; and (9) formation of the header is further fabrication of the terminals.

(1)

The government's first and basic argument is adequately addressed in Judge Newman's opinion. Although an "assembly" does involve the joining or coming together of solids, *see e.g., E. Dillingham, Inc.* v. *United States,* 470 F.2d 629, 633 (CCPA 1972); *United States* v. *Balis Bros.,* 451 F.2d 643, 645 (CCPA 1971), nothing in the statute requires that whether a component is a solid be determined as of the instant of initial contact. *See e.g., C. J. Tower & Sons of Buffalo* v. *United States,* 304 F. Supp. 1187 (Cust. Ct. 1969). The government concedes an "assembly" would occur if the headers were premolded with slots and the terminals were inserted into the slots. That Sigma achieves the same result more directly does not warrant denial of item 807.00 treatment.

(2)

The legislative history relied on is:

> Thus, item 807.00 would apply with respect to components of types which are designed to be fitted together with other components *and would not apply to chemical products, food ingredients, liquids, gases, powders, etc.* (emphasis added).

H.R. Rep. No. 342, 89th Cong., 1st Sess., 48–49.

The emphasized language identifies when item 807.00 does not apply, i.e., when the American component is a chemical product, food ingredient, etc. It does not restrict the nature of foreign made components of an assembly and provides no basis for reversal here. *See Tower, supra.*

The administrative regulation cited is 19 CFR § 10.16:

> The assembly operations performed abroad may consist of any method used to join or fit together solid components such as welding, soldering, riveting, force fitting, gluing, laminating, sewing or use of fasteners * * *. The mixing or combining of liquids, gases, chemicals, food ingredients and amorphous solids with each other or with solid components is not regarded as assembly.

Like the statute, that regulation does not require that whether a component is a solid be determined as of the instant of initial contact.

(3)

The decision in *J. E. Bernard & Co., Inc.* v. *United States,* 420 F.2d 1403 (CCPA 1970), involving a different statute, is distinguishable as explained in the opinion accompanying the appealed judgment.

Similarly, in *Texas Instruments, Inc.* v. *United States,* 681 F.2d 778 (CCPA 1982), the issue involved duty-free entry pursuant to the Generalized System of Preferences, 19 U.S.C § 2461 *et seq.,* not item 807.00. Moreover, the molding process there was one of many steps performed on silicon slices, each with integrated circuits (ICs), including scribing and breaking, mounting the ICs, connecting lead wires, molding, trimming, and severing. These fact differences are so great as to preclude a view of Texas Instruments as requiring that the present process not be held an "assembly".

(4)

The argument that because paint is initially liquid but becomes solid, and because item 807.00 makes painting incidental to assembly, every assembly process which begins with a liquid component and ends with solids must be outside item 807 overlooks the differences between the present process and painting. Painting is the act of laying on, or adorning with, paints or colors. *Webster's New International Dictionary,* second edition, 1956. That is not true here. Further, painting the terminals would not result in holding them in the desired spaced relationship as does the present process.

(5)

Item 807.00 does not forbid incorporation into new and different articles of commerce. What is precluded is loss by the terminals of

their physical identity. The government concedes that has not happened here.

(6)

Firestone, supra, involved a different statutory provision and a different process, as explained in the opinion accompanying the judgment appealed from.

(7) (8) (9)

Our conclusion that the present process constitutes "assembly" under item 807 is not precluded by the circumstance that the terminals are not in physical contact with each other, but are held in pre-designed spacial relationship with each other. In light of our conclusion, also, we need not reach the arguments that molding is not incidental to assembly and that incorporation of the header into a relay makes formation of the header a fabrication of the terminals.

AFFIRMED

ANNOUNCEMENT

Chief Judge Edward D. Re has announced the call of the First Judicial Conference of the United States Court of International Trade. The Conference will be held on Wednesday, February 15, 1984, in The Ballroom at Windows on the World, 106th Floor, One World Trade Center, New York, New York and will commence at 9 a.m.

Chief Judge Howard T. Markey of the United States Court of Appeals for the Federal Circuit is the Conference Luncheon Speaker.

The Conference will be composed of the Judges of the United States Court of International Trade, officials from the International Trade Commission, the Customs Service, the Departments of Justice, Commerce, and Treasury, members of the Bar of the Court, and other distinguished guests. The theme of the Conference is "The Customs Courts Act of 1980—Three Years Later".

Lawyers and other interested persons are invited to attend. Since capacity is limited, early return of your registration form is suggested. To facilitate final arrangements, it would be appreciated if your registration form is received on or before Friday, January 20, 1984.

For further information, please write to: "USCIT Judicial Conference," c/o Office of the Clerk, United States Court of International Trade, One Federal Plaza, New York, New York 10007.

FOR THE COURT,

JOSEPH E. LOMBARDI,
Clerk of Court.

United States Court of International Trade

Decisions of the United States Court of International Trade

(Slip Op. 83-131)

PAGODA TRADING CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83-11-01682

Before WATSON, *Judge.*

Memorandum Opinion and Order on Motion To Dismiss

[Motion Granted.]

(Decided December 15, 1983)

J. Paul McGrath, Assistant Attorney General, Joseph I. Liebman, Attorney in Charge, International Trade Field Office (*John J. Mahon*, Department of Justice) for defendant.

Rode & Qualey (Michael S. O'Rourke and *Patrick D. Gill*, of counsel) for plaintiff.

WATSON, *Judge:* Defendant moved to dismiss plaintiff's action for declaratory judgment on the ground of lack of jurisdiction. The motion was interposed following plaintiff's attempt to obtain expedited treatment for the action and following the Court's setting of a hearing on preliminary matters in Slip Opinion 82-129 (December 7, 1983). The short, but active, history of this action is set out in that opinion.

The Court considered all the papers filed, including plaintiff's opposition to the motion to dismiss, and oral argument was held on December 14, 1983. At the conclusion of oral argument the Court granted defendant's motion to dismiss. This opinion is issued to explain the dismissal in detail.

Defendant's first, and dispositive argument against jurisdiction, was that the administrative action challenged by plaintiff was not the "ruling" for the review of which prior to importation, 28 U.S.C. § 1581(h)[1] was designed.

The pronouncement in question, contained in T.D. 83-116 (48 Fed. Reg. 22,904) was published by the Secretary of the Treasury on May 23, 1983. It expressed guidelines for the classification of footwear. In particular, it contained a section devoted to guidelines "set forth as an aid to Customs officers in classifying specific footwear constructed with foxing." (48 Fed. Reg. 22,910)

The administrative decision complained of did not rule specifically on the merchandise which plaintiff intends to import. It is the opinion of the Court that judicial review in advance of importation was not intended for an instance when the merchandise in question and its classification still remain in an indefinite state. The expectation that a general administrative ruling will be applied in a particular case is not sufficient to create a ripe dispute in this area. The law envisions a classification dispute moved back in time prior to importation. But this is not possible if the classification decision and the identity of the affected merchandise are not fully materialized.

The defect in this action can be characterized in a number of ways—as a lack of ripeness, as a failure to exhaust administrative

[1] Subsection (h) of section 1581 provides:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of *the goods involved*, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, draw-backs, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation. [emphasis supplied]

It should be noted that Subsection (h) must be read in conjunction with 28 U.S.C. § 2643(4) which reads as follows:

In any civil action described in section 1851(h) of this title, the Court of International Trade may only order the appropriate declaratory relief.

remedies or, most specifically, as the absence of the sort of ruling for which § 1581(h) was intended.

The cause of action under § 1581(h) was not created to allow judicial review of general interpretative rulings issued by the Secretary of the Treasury whenever there is a likelihood of an effect on importations. The Court reads the language of the law as speaking to rulings which determine the fate of specific importations of specific goods. The Court also reads the legislative history as speaking to specific contemplated import transactions which contain identifiable merchandise and which will feel the impact of the ruling with virtual certainty. H. Rep. No. 96–1235, 96th Cong., 2d Sess. 46, 47 (1980)[2]

The presence of additional issues in this action regarding whether the ruling will actually be applied and what exactly the affected articles will be, is a good indication that what plaintiff is attempting is not simply an action in which a judgment on the correctness of classification is being moved back in time.

Here the Court cannot presume that this ruling will apply to particular merchandise even though importers may, in good faith, believe that to be inevitable. The Court cannot engage in a preliminary determination that merchandise will be classified in accordance with the ruling. That remains a function of the Customs Service. The necessity for the Court to consider these possibilities demonstrates the immaturity of the dispute from a judicial standpoint.

In dealing with the substance of a classification dispute, the Court should have to reach only the correctness of the classification, whether it is hearing the case before or after importation. A challenge to an administrative decision which does not allow the Court to limit its concentration to the correctness of a decision made as to a specific set of circumstances is not a challenge to a ruling within the contemplation of § 1581(h). It challenges a less

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[2] The legislative history reads as follows:

Subsection (h) of proposed section 1581 is also a new grant of subject matter jurisdiction to the Court of International Trade. It provides that the court may review, "prior to the importation of the goods involved," a ruling or a refusal to issue or change a ruling by the Secretary of the Treasury regarding such issues as the classification, valuation, or rate of duty of those goods. At present, judicial review of a ruling can be obtained only by completing an import transaction in accordance with the ruling and then proceeding to obtain judicial review in the usual manner, that is filing a protest, paying the duties and contesting the denial of the protest.

The Committee recognizes that in certain instances a person can be injured if he is unable to obtain judicial review of a ruling by the Secretary of the Treasury unless and until the contemplated transaction is completed, the duties are paid and a suit is commenced in the Customs Court. Thus, it may be appropriate in limited circumstances to permit judicial review prior to the completion of the transaction or payment of the duties. Many of the witnesses who testified before the Subcommittee agreed, including the Departments of Justice and the Treasury.

The time-honored rule is that the court does not possess jurisdiction to review a ruling or a refusal to issue or change a ruling by the Secretary of the Treasury unless it relates to a subject matter presently within the jurisdiction of the United States Customs Court, for example, an action brought pursuant to section 515 of the Tariff Act of 1930. The Committee intends a very narrow and limited exception to that rule. *The word "ruling" is defined to apply to a determination by the Secretary of the Treasury as to the manner in which it will treat the contemplated transaction.* In determining the scope of the definition of a "ruling," the Committee does not intend to include "internal advice" or a request for "further review," both of which relate to completed import transaction.

It is not the Committee's intent to permit judicial review prior to the completion of the import transaction in such a manner as to negate the traditional method of obtaining judicial review of import transactions. Many individuals will, or course, desire to obtain judicial review without the payment of duties. Such review, however, is exceptional and is authorized only when the requirements of subsection (h) are met. [emphasis supplied]

concrete administrative decision which is not ready for judicial review within the existing statutory framework.

For these reasons defendant's motion to dismiss for lack of jurisdiction is GRANTED.

(Slip Op. 83-132)

F. W. MYERS & CO., INC., (ON BEHALF OF GENERAL MOTORS CORPORATION), PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83-3-00345

Before FORD, *Judge.*

On Defendant's Motion To Dismiss

[Defendant's motion to dismiss granted; plaintiff's motion to remand denied.]

(Decided December 16, 1983)

Bedros Odian at the oral argument and on the brief for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Michael P. Maxwell* at the oral argument and *Susan Handler-Menahem* on the brief) for the defendant.

FORD, *Judge:* This action involves the importation of certain automobile parts which were entered, classified, and liquidated under Item 692.32 of the Tariff Schedules of the United States and assessed with duty at 3.9 percent ad valorem as parts of motor vehicles.

Plaintiff contends the merchandise is entitled to free entry under Item 692.33 as Canadian articles within the meaning of General Headnote 3(e) and Headnote 2 of Subpart B, Part 6 of Schedule 6 and pursuant to the Automotive Products Act of 1965.

The parties are before the Court by virtue of defendant's motion, pursuant to Rule 12 of the Rules of the United States Court of International Trade, to dismiss the action for lack of jurisdiction and/or failure to state a claim upon which relief may be granted.

The chronology of the number of various letters, requests, and documents filed with the Customs Service is as follows:

Plaintiff on April 11, 1980 filed a letter with the Customs Service requesting reliquidation of the involved entry pursuant to Section 501 of the Tariff Act of 1930, and, alternatively, requested that if reliquidation under Section 501 could not be accomplished within ninety days the letter be considered a formal protest. This procedure was followed pursuant to a directive issued by the District Director of Buffalo on February 5, 1975 suggesting such procedure.

Customs, on May 29, 1980, returned a copy of the April 11 letter with a handwritten notation indicating the request for reliquidation could not be granted without additional documentation.

On February 3, 1981 plaintiff filed a formal protest on Customs Form 19, enclosing the documents requested on May 29, 1980.

The Customs Service on June 16, 1981 sent a valid notice of denial stating the basis to be untimeliness of protest.

Plaintiff on July 7, 1981 requested a review of its denied protest of April 11, 1980 under Section 520(c) of the Tariff Act of 1930.

This request was denied by Customs in a handwritten note on a copy of said letter on December 1, 1981.

A nine-page document, dated August 25, 1982, entitled "Protest", was filed with Customs on August 26, 1982.

A document entitled "Supplemental Protest" (to the protest dated August 25, 1982) was filed with Customs on September 7, 1982.

The Assistant District Director on October 1, 1982 advised plaintiff that the "Protest" of April 11, 1980 was denied on May 29, 1980, and the protest of February 3, 1981 was denied on June 16, 1981.

Counsel for plaintiff on February 24, 1983 wrote the Customs Service requesting a reliquidation of said entry. The Assistant District Director on March 1, 1983 replied no further action was being taken by the Customs Service.

Counsel for plaintiff on March 7, 1983 filed a summons against the denial of the protest filed on August 26, 1982.

In view of the numberous documents, letters and handwritten notations which were involved in this matter at the Customs Service level, it is incumbent upon the Court to clarify the statutory requirements as well as the regulations governing protests and denials. The statutory provision, 19 U.S.C. § 1514(c), provides "Only one protest may be filed for each entry of merchandise * * *". Therefore, the only valid and timely protest was filed by plaintiff on April 11, 1980. While this was a letter protest and not one filed on Customs Form 19, it did contain the information required of a protest. It has ofttimes been said that a protest is not required to be made with technical precision as long as the objections are distinct, specific and sufficient to bring to the attention of Customs the importer's intent and the relief sought. *Mattel, Inc.* v. *United States,* 72 Cust. Ct. 257, C.D. 4547, 377 F. Supp. 955 (1974). The letters and documents filed on February 3, 1981, August 25, 1981, September 7, 1982 and February 24, 1983 are all beyond the ninety-day statute of limitations for the filing of protests set forth in 19 U.S.C. § 1514(c)(2). None of these documents, etc., can be considered an amendment of the protest. To amend a protest under 19 U.S.C. § 1514(c)(1) and 19 C.F.R. 174.14 such amendment must be filed within the ninety-day period during which a protest may be filed. The above documents do not fall within this time period.

The requirements for the denial of a protest are specifically provided for in 19 U.S.C. § 1515(a) and 19 C.F.R. 174.30. Section 1515(a) provides "Notice of the denial shall be mailed in the form and

manner prescribed by the Secretary. Such notice shall include a statement of reasons for the denial, as well as a statement informing the protesting party of his right to file a civil action contesting the denial of a protest under section 514 of the Tariff Act of 1930." Plaintiff contends that the *dicta* in the case of *Labay International v. United States*, 83 Cust. Ct. 152, C.D. 4834 (1979) supports its position. The Court therein held a handwritten notation of the Customs Service constituted a denial. While the statutory provision controlling at the time of *Labay* required notice to be in the style and manner prescribed by the Secretary, it did not require notice of the right to institute a civil action. Similarly the regulations, 19 C.F.R. 174.30 (1974), did not require notice of the right to institute a civil action. The *Labay* case, therefore, is not controlling under the present law.

The only denial issued by the Customs Service which complies with the statutory provisions and Customs Regulations is the denial of June 16, 1981. Customs utilized the proper basis, i.e., untimeliness, if its denial was directed against the protest of February 3, 1981. However, said protest did not comply with 19 U.S.C. § 1514(c), as it was the second protest filed against the same entry and merchandise. Nonetheless, this denial did enumerate the entry number, date of liquidation, etc., and is accordingly a denial against the only valid protest filed, that of April 11, 1980. The basis of denial, untimeliness, is improper as to the protest of April 11, 1980. However, it constitutes the only denial which conforms with the statute and regulations and, in fact, started the running of the statute of limitations with respect to the filing of this action. A summons to be timely must be filed within the 180 days after notice of denial. 28 U.S.C. § 2636. The denial was sent on June 16, 1981, and a summons was filed on March 7, 1983. The Court, therefore, lacks jurisdiction to entertain this action.

Plaintiff's letter of July 7, 1981, requesting review of the denial to reliquidate constitutes a protest under the provisions of 19 U.S.C. § 1520(c). This section authorizes the Secretary to reliquidate an entry to correct a clerical error, mistake of fact, or other inadvertance not amounting to an error of law, notwithstanding the fact that a valid protest has not been filed. However, the statute provides the clerical error, mistake of fact, etc. must be brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction. The entry involved was liquidated on March 28, 1980. Therefore, a protest filed on July 7, 1981 is untimely.

Accordingly, defendant's motion to dismiss is granted, and plaintiff's motion to remand the matter to Customs is denied.

Judgment will be entered accordingly.

(Slip Op. 83-133)

STEWART-WARNER CORPORATION, PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No. 81-12-01740

Before MALETZ, *Senior Judge.*

Opinion and Order

(Dated December 16, 1983)

Eugene L. Stewart (Eugene L. Stewart, Terence P. Stewart and *Mark A. Casso* on the briefs) for plaintiff.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*Deborah E. Rand* on the brief) for defendant.

Lamb & Lerch; Richard J. Kaplan, of counsel (*Sidney H. Kuflik* on the brief) for amicus curiae Diversified Products, Inc.

MALETZ, *Senior Judge:* This action involves a rare event in this court—a challenge by an American manufacturer of a Customs Service classification of competing imported merchandise. The American manufacturer, Stewart-Warner Corp. (Stewart-Warner), brought this action pursuant to section 516 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516 (Supp. IV 1980), and 28 U.S.C. § 1581(b), seeking reclassification of certain speedometers used primarily on cycle exercisers.[1] Upon entry the merchandise was classified as "other" speedometers under item 711.98 of the Tariff Schedules of the United States (TSUS). Plaintiff claims that these speedometers should be classified as bicycle speedometers under item 711.93, which would result in an increase in the rate of duty by 21.1% ad valorem.[2]

The government has classified the merchandise as other than bicycle speedometers on the premise that the merchandise is chiefly used on stationary exercise cycles, not on mobile bicycles. Therefore, the government concludes, the imported speedometers cannot be a bicycle speedometer for tariff purposes. Stewart-Warner, on the other hand, contends that the legislative history of the TSUS

[1] Although Stewart-Warner made no preliminary request for information as to classification or rate of duty as required by 19 U.S.C. § 1516(a) (Supp. IV 1980), this is not a jurisdictional defect. "Complaints under 516(b) [the predecessor to 19 U.S.C. § 1516(a)] may be filed without a preliminary request for information as to the classification and rate of duty if the complainant knows the same." T.D. 44,466, 58 Treas. Dec. 363, 865. There is no dispute here that Stewart-Warner did know that information. *See generally Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450 (1978). To require more of plaintiff would be a mindless formalism.

[2] The relevant provisions provide:

Schedule 7, Part 2, Subpart D:

. . . . . .

Revolution counters, production counters, taximeters, odometers, pedometers, counters similar to the foregoing articles, speedometers and tachometers, all the foregoing not provided for in subpart C of this part; parts of the foregoing:

. . . . . .

711.93	Bicycle speedometers and parts thereof	24.9% ad val.
711.98	Other	3.8% ad val.

provision for bicycle speedometers strongly indicates that "bicycle-type" speedometers, including the imported merchandise, should be classified under item 711.93.

The court's own examination of the legislative history of the bicycle speedometer tariff provision impels it to conclude that Stewart-Warner is correct. Accordingly, for the reasons that follow, judgment shall enter for plaintiff.

But for the inexorable march of progress, it is safe to conclude that this action would never have arisen. For the speedometers which are the subject of this action had not been invented at the time the new TSUS provision for bicycle speedometers was enacted in 1965. In the early 1970's, however, in response to a growing demand for a speedometer which could be mounted on the left side of either a bicycle or an exerciser, the Japanese developed the double-gear hub drive speedometer—the subject of the present action.

The advantage of the double-gear hub drive speedometer vis-a-vis its single-gear counterpart is its capacity to give a clockwise speed indicator readout when mounted on the left side of the wheel. The single-gear speedometer can only give a clockwise readout when mounted on the right side of a wheel. Since, as a practical matter, the design of exercise cycles precludes mounting a speedometer on the right side of the wheel, the double-gear hub drive speedometer has been used primarily in conjunction with exercisers, though it is perfectly suited for use on bicylces. Indeed, in all respects save one, this speedometer is physically identical with a single-gear bicycle speedometer, the one difference being that the former has the additional gear which permits it to function in a clockwise manner when mounted on the left side of a wheel.

At the outset it should be noted that the government does not dispute that the merchandise is a bicycle-type speedometer, nor does the government quarrel with the fact that a double-gear hub drive speedometer is suitable for use on a bicycle. The crux of the government's argument rather is twofold. First, plaintiff cannot prevail, the government maintains, since double-gear hub drive speedometers are not chiefly used as bicycle speedometers. Alternatively, the government submits that item 711.93 is an *eo nomine* tariff provision, that the merchandise does not possess an essential resemblance to a bicycle speedometer and that, for that reason, Stewart-Warner's action must likewise fail. While a reading of item 711.93 *in vacuo* might arguably provide some succor to the government, when that provision is exposed to the light of its legislative history it becomes unquestionable that the imported merchandise is properly classified as a bicycle speedometer under item 711.93.

The Tariff Act of 1930 as originally enacted made no specific provision for bicycle speedometers. This situation continued even after the TSUS became law in 1963. Within weeks after enactment of the TSUS several errors and omissions in the new schedules were

pointed out to Congress, including the absence of a provision for bicycle speedometers. In December, 1963 the House Ways and Means Committee invited interested parties to submit proposed changes in order to eliminate anomalies in the TSUS. The upshot was the Tariff Schedules Technical Amendments Act of 1965, Pub. L. No. 89–241, 79 Stat. 933. *See* H.R. Rep. No. 342, 89th Cong., 1st Sess. (1965); S. Rep. No. 530, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. Code Cong. & Ad. News 3,416.

In response to the December, 1963 congressional invitation, W. E. Faithorn, Jr., assistant secretary for Stewart-Warner, submitted a letter to the House Ways and Means Committee. The Faithorn letter pointed out the overwhelming need for a specific bicycle-type speedometer tariff provision in order to plug a purported loophole in the TSUS that allowed importers to bring in bicycle-type speedometers, putatively for use on motor scooters and motor bikes, at a substantially lower rate of duty.[3]

Prompted by this letter, Congress enacted section 36(k) of the Tariff Schedules Technical Amendments Act, 79 Stat. 941, which amended the provisions pertaining to speedometers. That amendment included a specific breakout provision for bicycle speedometers providing:

711.91 [1]	Bicycle speedometers and parts thereof.	55% ad val.
711.98	Other	10% ad val.

[1] Item 711.91 was redesignated as item 711.93 by section 405(d), Title IV of the Automotive Products Trade Act of 1965, Pub. L. No. 89–283, 79 Stat. 1016, 1025.

The House Report accompanying this amendment added the following telling note:

> This new provision for bicycle speedometers would include *certain bicycle-type speedometers* which are used to a limited extent on motor scooters and motor bikes and which are currently classified under item 711.92 as being "suitable for use in highway-type motor vehicles."

H.R. Rep. No. 342, 89th Cong., 1st Sess. 26 (emphasis added). In the court's view, Congress has clearly spoken. *Cf. Asahi Chemical Industry Co.* v. *United States*, 4 CIT —, 548 F. Supp. 1261 (1982). Indeed, the House Report, when read in the context of the Faithorn letter, makes it plain that it was the intent of Congress to pre-

[3] The 1963 TSUS provision for speedometers read in part:

Importers of bicycle speedometers, by taking advantage of this so-called loophole, realized a savings in duty equal to the difference between the item 711.92 rate and that for item 711.94.

Speedometers and tachometers, and parts thereof:

711.92	Speedometers suitable for use in highway type motor vehicles	9% ad val.
711.94	Other speedometers and tachometers	$2.25 each + 35% ad val.
711.96	Parts	45% ad val.

Importers of bicycle speedometers, by taking advantage of this so-called loophole, realized a savings in duty equal to the difference between the item 711.92 rate and that for item 711.94.

vent bicycle-*type* speedometers, which could readily be used on bicycles, from being imported at tariff rates lower than the rates which applied to bicycle speedometers.

To the government's and amicus' argument that the phrase "certain bicycle-type speedometers" in the House Report refers only to motor scooters and motor bike speedometers, a ready reply is provided by the Faithorn letter, a document which furnished the sole impetus for enactment of item 711.93 and, as such, is a further strong indicia of Congress' intent on this subject. *See Chicago & N.W. Ry. Co.* v. *United Transportation Union,* 402 U.S. 570, 576 (1971); *Ameliotex, Inc.* v. *United States,* 65 CCPA 22, C.A.D. 1200, 565 F.2d 674 (1977); *Best Moulding Corp.* v. *United States,* 51 CCPA 7, C.A.D. 829 (1963). From that letter it is obvious that the word "certain" refers not only to motor scooter and motor bike speedometers, but, in the words of the Faithorn letter, also to speedometers which "from the point of view of design, material, construction and overall quality, are built to the less expensive standards for a bicycle speedometer as compared to a regular motorcycle or automobile instrument." This definitively describes the subject merchandise.

Although Congress did not use the term "bicycle-type speedometers" in drafting item 711.93, a reading of the entire legislative history makes it unmistakable that this is what Congress intended to include in that item number. *See Philbrook* v. *Glodgett,* 421 U.S. 707, 713 (1975); *United States* v. *Bacto-Unidisk,* 394 U.S. 784, 799–801 (1969) (A court "must take care not to narrow the coverage of a statute short of the point where Congress indicated it should extend."). And it is clear from all the evidence that the imported merchandise are bicycle-type speedometers.

Finally, as for the contentions that item 711.93 is either an *eo nomine* or use provision, while rules of construction may be employed to determine the meaning of a tariff provision, those rules are inapplicable where it is shown that the legislature intended a different result. *Esco Manufacturing Co.* v. *United States,* 63 CCPA 71, 75, C.A.D. 1167, 530 F.2d 949, 952 (1976) ("Where the intent of Congress is apparent, rules of construction [such as whether a tariff item number is a classification by use or *eo nomine* provision] may not be employed to narrow, limit, or circumscribe the statute."); *Sandoz Chemical Works, Inc.* v. *United States,* 50 CCPA 31, 35, C.A.D. 815 (1963); *S & T Imports, Inc.* v. *United States,* 78 Cust. Ct. 45, 59, C.D. 4690 (1977). It is thus unnecessary to determine whether item 711.93 is a tariff classification by use or an *eo nomine* provision, given that the classification of the imported merchandise was manifestly intended to be under item 711.93. *See also United States* v. *Durst Mfg. Co.,* 46 CCPA 74, 76, C.A.D. 700 (1959). In short, labelling item 711.93 as either a use or *eo nomine* provision would generate, not eliminate, ambiguity contrary to congressional intent.

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Based on all the foregoing, the court finds that the imported merchandise are bicycle speedometers within the meaning of item 711.93 and should be so classified. Judgment for plaintiff shall enter accordingly.

HERBERT N. MALETZ,
Senior Judge.

(Slip Op. 83-134)

FREDERICK WHOLESALE CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Before CARMAN, *Judge.*

Court No. 83-1-00074

Memorandum Opinion and Order

[Defendant's motion to dismiss granted.]

(Decided December 19, 1983)

Siegel, Mandell & Davidson, P.C., (Allan H. Kamnitz and *Michelle Benjamin* on the motion) for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, (*Jerry P. Wiskin* on the motion) for the defendant.

CARMAN, *Judge:* This matter is before me on defendant's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, or alternatively, for judgment on the pleadings and/or summary judgment. Plaintiff has cross-moved for summary judgment.

Plaintiff alleges in its complaint that the January 29, 1982 notice of liquidation of Entry No. 792888 is "null and void" since said notice was not in accordance with the terms of 19 U.S.C. § 1500(e)(1982)[1] and 19 C.F.R. § 159.9(b)(1983)[2]. Plaintiff argues that absent proper notice, there has never been a final liquidation of Entry No. 792888, and that since more than 1 year has passed from date of entry without a final legal liquidation, Entry No. 792888 must be deemed to have been liquidated pursuant to 19 U.S.C. § 1504(a)(1982) "at the rate of duty, value, quantity and amount of duties asserted at the time of entry by the importer * * *" Specifi-

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[1] 19 U.S.C. § 1500(e)(1982) provides:
The appropriate customs officer shall, under rules and regulations prescribed by the Secretary—
* * * * * * *
give notice of such liquidation to the importer, his consignee, or agent in such form and manner as the Secretary shall prescribe in such regulations.

[2] 19 C.F.R. § 159.9(b) provides:
Posting of bulletin notice. The bulletin notice of liquidation shall be posted for the information of importers in a conspicuous place in the customhouse at the port of entry (or Customs station, when the entries listed were filed at a Customs station outside the limits of a port of entry), or shall be lodged at some other suitable place in the customhouse in such a manner that it can readily be located and consulted by all interested persons, who shall be directed to that place by a notice maintained in a conspicuous place in the customhouse stating where notices of liquidation of entries are to be found.

cally, plaintiff alleges that the bulletin notice of liquidation was not posted in a conspicuous place at the New York Customhouse and that no sign was maintained at the Customhouse directing interested parties where said notice of liquidation of entries could be found.

Defendant moves to dismiss plaintiff's complaint arguing this court lacks jurisdiction because no timely protest was filed against the liquidation of Entry No. 792888. Defendant contends the notice requirements of 19 C.F.R. § 159.9(b) were satisfied, and since plaintiff failed to file a protest within 90 days after notice of liquidation as required by 19 U.S.C. § 1514(c)(2)(A)(1982),[3] it cannot pursue its case in this court.

The facts, stipulated to by the parties, in their essence follow here.

The bulletin notice at issue was first placed on an open table in Room 345 and then on an open shelf in Room 331 of the Customhouse at Six World Trade Center in New York City. Six World Trade Center is an eight-story building covering approximately one square city block. There are three means of ingress and egress to the Customhouse. The second floor (plaza level), where the cashier's office, information office, office directory and elevator to the upper floors are located, can be reached by escalators or a stairway.

During the period in question (January 29, 1982 through April 30, 1982), there was no sign maintained in the Customhouse stating the location of bulletin notices. Defendant maintains no such sign was required. The bulletin notice in question was originally placed in Room 345 of the Customhouse which is one of 36 offices on the third floor, and located adjacent to a public corridor. There was no directional sign in the third floor corridor directing the public specifically to Room 345. The bulletin notices in Room 345 were placed on a table and during the period in question, Room 345 of the Customhouse was a public room.

Although a sign existed on the door of Room 345 stating limitations on the hours of access to that room during the period January to April, 1982, the Customs Service had terminated the practice of limiting access to Room 345 to the hours stated therein. Approximately 4 weeks after the date of liquidation, *i.e.*, January 29, 1982, the bulletin notice of liquidation was moved from Room 345 to Room 331, where it was maintained on a shelf that was open, plainly visible and accessible to importers and other interested persons. There was no sign maintained anywhere in the Customhouse advising the public that the bulletin notices of liquidation were maintained in Room 331 of the Customhouse. Defendant maintains that no such sign was required. On or about January 29, 1982

[3] 19 U.S.C. § 1514(c)(2)(A)(1982) provides in pertinent part:

A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within ninety days after but not before——

notice of liquidation or reliquidation * * *

through April 30, 1982, Room 331 of the Customhouse was open to the public, located adjacent to a public corridor, was the subject of a directional sign which contained the legend "Documents Control, 331," and had a sign on the door stating: "Documents Control and Certification."

The United States Customs Service during the period January through April, 1982, maintained, on the lobby level of the New York Customhouse, a Customs Information Office. The Regional Commissioner of Customs, during the period in question, maintained an office at the New York Customhouse in Room 716 which was open to the public. The New York Seaport Area Director, during that period, maintained an office in Room 423 of the New York Customhouse also open to the public.

Plaintiff is the importer of record for Entry No. 792888 and is not a first-time importer at the New York Seaport. Plaintiff had made a considerable number of entries of merchandise at the New York Seaport prior to Entry No. 792888. Entry No. 792888 was "liquidated" on January 29, 1982 and the entry papers were so stamped. The bulletin notice of liquidation for January 29, 1982 listed the liquidation of Entry No. 792888 and was maintained in Room 345 and then in Room 331 of the Customhouse, Six World Trade Center, New York, New York 10048.

Plaintiff did not file a protest within 90 days of January 29, 1982. Plaintiff did, however, file a protest on August 26, 1982, which stated that it contested the validity of the liquidation of January 29, 1982. Entry No. 792888 was liquidated on January 29, 1982, with an increase in duties totalling $47.49. This increase in duties found to be due and owing when Entry No. 792888 was liquidated resulted from the decision of the Customs Service to classify certain bottles separately, rather than as an entirety. The only models affected were: H2/554, H2/555, H2/557, H2/558. All other merchandise in Entry No. 792888 was "liquidated" as entered by the plaintiff. The increased duties found due and owing upon the liquidation of Entry No. 792888 were paid by or on behalf of plaintiff on February 5, 1982, 7 days after the entry was "liquidated."

Plaintiff received a courtesy notice of liquidation for Entry No. 792888 prior to January 29, 1982. The courtesy notice of liquidation for Entry No. 792888 gave actual knowledge of the impending liquidation of Entry No. 792888 for January 29, 1982. Plaintiff had authorized a law firm to review the liquidation of entries and to file protests on its behalf.

The initial question to be determined is whether this court has subject matter jurisdiction to decide whether the bulletin notice of liquidation pertaining to Entry No. 792888 was given in accordance with 19 C.F.R. § 159.9(b).

Since the subject matter of this case concerns decisions which are protestable under 19 U.S.C. § 1514, plaintiff alleges jurisdiction

under 28 U.S.C. § 1581(a) (Supp. V 1981).[4] The filing and denial of a timely protest is necessary for this court to exercise subject matter jurisdiction pursuant to 28 U.S.C. § 1581(a). Generally, a timely protest is that which is accomplished within 90 days after, but not before, a notice of liquidation. 19 U.S.C. § 1514(c)(2)(A)(1982). In the case at hand, plaintiff did not file a protest within 90 days after the notice of liquidation. However, plaintiff argues that by virtue of the defendant's failure to give notice of liquidation as required by law, the liquidation of January 29, 1982 is incomplete, and a protest need not have been filed within 90 days of January 29, 1982. Plaintiff filed a protest after the 90-day period challenging the liquidation on this basis, and this protest was denied on December 27, 1982.

It is clear that this court generally is empowered to inquire whether the facts necessary to the exercise of its subject matter jurisdiction have been established. *See Schering Corp.* v. *United States,* 67 CCPA 83, 87, 626 F.2d 162, 167 (1980); *General Petroleum Corp.* v. *United States,* 56 Cust. Ct. 249, 251 (1966). (The court has the power to determine whether a protest is timely.)

The facts surrounding the bulletin notice of liquidation are relevant to the timeliness of plaintiff's protest. Absent proper notice of liquidation, the ability of a plaintiff to protest in a timely fashion is greatly impaired. Therefore, to determine whether the protest was timely, this court finds it necessary to look to the jurisdictional facts surrounding the liquidation in question to determine whether notice was given in compliance with the provisions of 19 C.F.R. § 159.9. *See Commonwealth Oil Refining Co.* v. *United States,* 67 Cust. Ct. 37, 45, 330 F. Supp. 598, 603–04 (1971), *aff'd,* 60 CCPA 162, 480 F.2d 1352 (1973).

Section 159.9(b) of Title 19 of the Code of Federal Regulations provides that the posting of the bulletin notice of liquidation shall be accomplished either by posting the bulletin notice in a conspicuous place in the Customhouse or by lodging it in some other suitable place in the Customhouse where it can be readily located by interested persons directed to that place by a notice maintained in a conspicuous place that states where notices of liquidation can be found. Plaintiff asserts that the bulletin notice of liquidation in the case at hand was neither posted in a conspicuous place nor was there a sign directing interested persons to where bulletin notices of liquidation could be found.

The bulletin notice of liquidation in question was initially placed on a table in Room 345 of the Customhouse with access to the public. The table was open and plainly visible. When the notice was later moved to Room 331 where it was maintained on a shelf, it was again open and plainly visible. Further, a Customs Informa-

[4] 28 U.S.C. § 1581(a) (Supp. V 1981) provides:
(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

tion Office was maintained at the lobby level and was open to the public.

With respect to the requirement of posting [5] in a conspicuous place, this court in *Commonwealth Oil* stated the following:

> [T]he bulletin notice of liquidation must be posted in a place *which is plainly visible and accessible to the ordinary interested person.* In this respect, we do not consider that it need seize the attention of the visitor with the impact and aggressiveness of a colorful advertisement, but rather *that it have a placement which is open and accessible.*

67 Cust. Ct. at 45, 330 F. Supp. at 605 (emphasis added).

In the case at hand, the bulletin notice, both when it occupied Room 345 on an open table and then in Room 331 on an open shelf, was open and accessible to importers and other interested parties. Furthermore, both Room 345 and Room 331 are located in a public corridor near the elevators and open and accessible to the public. Since the bulletin notice was in an open and accessible place, this court must find that the bulletin notice was made available to the importer in a conspicuous place and the requirements of 19 C.F.R. § 159.9(b) have been met.[6]

Therefore, notice having been properly given pursuant to 19 C.F.R. § 159.9(b), the protest was not timely made, and defendant's motion to dismiss must be, and hereby is, granted. Furthermore, plaintiff's cross-motion for summary judgment, must be, and hereby is, denied.

Dated: December 19, 1983.

GREGORY W. CARMAN,
Judge.

Judgment

FREDERICK WHOLESALE CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83-1-00074

Before: CARMAN, *Judge.*

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED: That defendant's motion to dismiss is GRANTED, and plaintiff's cross-motion for summary judgment is denied.

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[5] The term "posting" in 19 C.F.R. § 159.9(b) can be broadly construed and has not been interpreted to require vertical affixation. The court in *Olavarria & Co. v. United States*, 47 CCPA 65, 68 (1960), stated: "[A]ssuming the notices were displayed on a desk or file cabinet instead of on a bulletin board or wall, that fact alone would not necessarily establish that they were not posted in a 'conspicuous' place * * *" The operative word in the regulation is "conspicuous," and a mode of "posting" that discharges the provision's function of apprising interested persons, such as in the case at hand, is acceptable.

[6] Although a sign directing interested persons to the place where the bulletin notices of liquidation are maintained can be viewed as desirable, this court cannot find the maintenance of such a sign is required by 19 C.F.R. § 159.9(b), where the bulletin notices themselves are posted in a conspicuous place.

Dated at New York, N.Y., December 19, 1983.

GREGORY W. CARMAN,
Judge of the United States Court of International Trade.

Slip Op. 83-135

HIDE-AWAY CREATIONS, LTD., PLAINTIFF *v.* UNITED STATES ET AL., DEFENDANTS

Court No. 83-5-00644

CONFECCIONES GENERALES, S.A., PLAINTIFF *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 83-5-00645

Before BERNARD NEWMAN, *Judge.*

Leather Wearing Apparel from Mexico—Final Results of Administrative Review under Section 751

Statement in final affirmative countervailing duty determination and order covering leather wearing apparel from Mexico that "[i]n accordance with section 751 of the Act [19 U.S.C. § 1675] the Department [of Commerce] intends to conduct a review within twelve months of the publication of the countervailing duty order" *held:* insufficient to satisfy the statutory requirement of publication of notice in the Federal Register prior to conduct of administrative review under section 751. Mere statement of intent to conduct a review within twelve months of order without notice of specific date that review would be initiated was inadequate to give notice of a review commenced one year and ten days after publication of the final order. The Court finds that lack of notice prejudiced plaintiffs by ITA's exclusion of untimely filed certifications that the exporter neither received nor applied for benefits under Mexican subsidy programs. Consequently, remand to ITA for consideration of the certificates is warranted.

Since allegations of the complaints are directed against the final results of the administrative review under section 751, and not against a post-annual review refusal by ITA to consider certain certifications, as claimed by defendants, Court has subject matter jurisdiction under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c), and the complaints state a claim upon which relief can be granted. Accordingly, defendants' motion to dismiss are denied.

[Temporary injunctions extended to 20 days after final disposition by Court following remand; defendants' motions to dismiss denied; remanded to ITA for further proceedings.]

(Dated December 21, 1983)

Kemp, Smith, Duncan & Hammond, Esqs. (Luis Chavez and *John J. Scanlon, Jr., Esqs.*, of counsel) for plaintiffs.

Richard K. Willard, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch and *Sheila N. Ziff, Esq.*, for defendants.

BERNARD NEWMAN, *Judge:*

INTRODUCTION

These companion actions raise yet another question of first impression relating to the administration of this nation's countervailing duty law, a vital aspect of our international trade policy. Inasmuch as these two actions involve identical facts and legal issues, practicality dictates the writing of a consolidated opinion.

Confecciones Generales, S.A. (Confecciones) is the exporter of merchandise covered by a countervailing duty determination and order; Hide-Away Creations, Ltd. (Hide-Away) is the importer. Plaintiffs instituted these actions on April 28, 1983 contesting the final results of an administrative reivew of a countervailing duty determination and order of the United States Department of Commerce, International Trade Administration (ITA) conducted pursuant to Section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675 (Section 751) covering imports of leather wearing apparel from Mexico (48 Fed. Reg. 13474 (March 31, 1983)).

Plaintiffs seek to enjoin the assessment of countervailing duties and the collection of a cash deposit of estimated countervailing duties of $169,216.18 on the imported merchandise predicated on the ground that the administrative record establishes that the exporter, Confecciones, received no bounty or grant from the Mexican Government within the meaning of section 303 of the Tariff Act of 1930, 19 U.S.C. § 1303. In response to the complaints, defendants have moved to dismiss, contending that the Court lacks subject matter jurisdiction, and that plaintiffs have failed to state a claim upon which relief can be granted.

On June 10, 1983 this Court granted plaintiffs' applications for temporary restraining orders enjoining defendants from liquidating any of the entries covered by the final results, *supra*, and from enforcing or implementing the final results. By stipulations dated June 29, 1983, the temporary restraining orders were extended to and including ten days after entry of the Court's ruling on defendants' motions to dismiss. Subsequently and by consent on August 29, 1983, this Court extended the temporary restraining orders to and including 20 days after entry of the Court's ruling on defendants' motions to dismiss.

Oral argument was heard on November 22, 1983.

For the reasons below, I conclude that the Court has subject matter jurisdiction and that plaintiffs have stated a claim upon which relief can be granted. I further find that these matters must

be remanded to ITA for further proceedings consistent with the conclusions herein.

BACKGROUND

On April 10, 1981, ITA published notice of its final affirmative countervailing duty determination and order covering imports of leather wearing apparel from Mexico (46 Fed. Reg. 21357). According to the notice, ITA found that the Government of Mexico's tax rebate certificate program ("CEDI") constituted a bounty or grant (subsidy) within the meaning of section 303 of the Tariff Act of 1930. The United States Customs Service (Customs) was directed to continue the suspension of liquidation previously ordered in the preliminary affirmative determination published on January 14, 1981 (46 Fed. Reg. 3256); and effective April 10, 1981 a cash deposit of 5 percent *ad valorem* was required on leather wearing apparel from Mexico entering the United States, or being withdrawn from warehouse for consumption. In its final determination and order, ITA also announced that "[i]n accordance with section 751 of the Act [19 U.S.C. § 1675], the Department *intends to conduct an administrative review within twelve months of the publication of the countervailing duty order*" (emphasis added).

However, without publication of any further prior notice, on April 19, 1982—twelve months and ten days after the publication of the final determination and order—ITA commenced the first administrative review of the countervailing duty order on leather wearing apparel from Mexico by sending a questionnaire to the Mexican Embassy in Washington, D.C. which was to forward copies to all concerned manufacturers in Mexico.

On January 21, 1983, ITA published notice of the preliminary results of its first administrative review of the countervailing duty order on leather wearing apparel from Mexico (48 Fed. Reg. 2810) covering the period of January 14, 1981 (the date liquidation was suspended in the preliminary affirmative determination (46 Fed. Reg. 21357)) through December 31, 1981. In addition to the CEDI program, which was found to be countervailable in the final affirmative countervailing duty determination, the review investigated the Fund for the Promotion of Exports of Mexican Manufactured Products ("FOMEX") and the Certificates of Fiscal Promotion ("CEPROFI") programs of the Mexican Government, the latter two programs having been found countervailable in ITA's final affirmative countervailing duty determination and order covering *ceramic tile* from Mexico published on May 10, 1982 (47 Fed. Reg. 20012).

The notice explained that ITA preliminarily determined the amount of net bounty or grant bestowed by the Government of Mexico for exports of leather wearing apparel by firms other than three "certified" firms, for the period under review, to be: 10 percent of the f.o.b. invoice price under CEDI, 3.35 percent under

FOMEX, and zero percent under CEPROFI, for a total of 13.35 percent of the f.o.b. invoice price.

According to the notice, ITA had set forth a certification process in the final affirmative countervailing duty order on *ceramic tile* from Mexico (which process was utilized by ITA in the instant review, as well) that would allow an adjustment of the rate of cash deposit for estimated countervailing duties to zero for firms certified and verified as having neither applied for nor received countervailable benefits. On July 2, 1982, ITA received the required certificates from these three "certified" firms as well as the corresponding verification certificates from the Mexican Government. Accordingly, it was preliminarily determined that the aggregate net bounty or grant conferred by the three programs during the period under review was zero percent for the three "certified" firms but was 13.35 percent *ad valorem* for all other firms.

ITA completed its administrative review and issued its final results (identical to the preliminary results), which were published in the Federal Register on March 31, 1983 (48 Fed. Reg. 13474).

Confecciones is a Mexican producer of leather wearing apparel which is the subject of the involved countervailing duty order and section 751 administrative review. Hide-Away purchased and imported the leather wearing apparel from Confecciones during the period of January 14 through December 31, 1981, and has continued to import such merchandise to the present.

On about January 29, 1983 plaintiffs first learned of the preliminary results in the first administrative review (published on January 21, 1983) and immediately proceeded to comply with ITA's certification procedures. Thus, on February 7, 1983—some six weeks before the publication of the final results of the first administrative review—Hide-Away wrote to the Mexican Embassy in Washington forwarding certification forms dated February 4, 1983, signed by Confecciones, stating that the latter company did not receive and will not apply for benefits under the CEDI, FOMEX and CEPROFI programs. Hide-Away's letter requested the Embassy to obtain a certificate from the Mexican Government which would establish a zero deposit duty rate for Confecciones. Thereafter, by letter dated April 20, 1983 the Mexican Embassy forwarded to ITA certifications prepared by the Government of Mexico stating that Confecciones neither received nor applied for any benefits from the three programs. The Embassy sent another letter, also dated April 20, 1983, enclosing certificates from five Mexican leather wearing apparel manufacturers, including Confecciones, and requested the zero deposit rate. Those letters were received by ITA on April 21, 1983, three weeks after publication of the final results of the administrative review.

On May 10, 1983, ITA received a letter from counsel for plaintiffs confirming: (1) that, as far back as February 7, 1983, Confecciones had submitted the required certificates to the Government of

Mexico requesting vertification that Confecciones had neither applied for nor received benefits under the programs; and (2) that counsel had been informed by ITA and it had received the verifications and certificates on April 21, 1983. The letter requested ITA to include Confecciones among the firms determined to have received a total bounty or grant of zero for the period of January 14, 1981 through December 31, 1981 and any period subsequent thereto. Plaintiffs' counsel was advised by ITA that the certificates were filed too late for consideration in the first annual review, and ITA refused to grant Confecciones' claim to a zero deposit rate.[1]

JURISDICTION

We first address defendants' motions to dismiss for lack of subject matter jurisdiction.

In substance, defendants' position is that Confecciones' certificates were received by ITA too late for consideration of Confecciones' claimed zero benefit; and that the gravamen of plaintiffs' complaints is ITA's refusal to reopen the matter and to conduct a post-annual review adjustment affecting the entries covered by the completed first annual review. Based upon the rationale of this Court's decision in *Ceramica Regiomontana, S.A.* v. *United States*, 5 CIT —, Slip Op. 83–7, 557 F. Supp. 596 (1983), defendants contend that there is no authority for ITA to make a post-annual review adjustment and this Court lacks jurisdiction under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c) to entertain an action contesting ITA's refusal to grant plaintiffs a post-annual review adjustment.

Plaintiffs insist that, by the plain language of paragraphs seven through fourteen of their complaints, they are contesting the final results of the first administrative review under section 751 published in the Federal Register on March 31, 1983 in that such results failed to include Confecciones as a "zero duty deposit rate" company (plaintiffs' memoranda, at 12). Accordingly, argue plaintiffs, the Court has subject matter jurisdiction under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c).

I agree with plaintiffs' argument, and find that defendants' reliance upon *Ceramica* is misplaced.

In *Ceramica*, the plaintiff had applied to ITA for an interim reduction of the estimated countervailing duty cash deposit rate on imports of ceramic tile from Mexico. Plaintiff's application for an interim adjustment was made after the final countervailing duty order and prior to the review under section 751. After ITA's refusal to grant plaintiff an interim adjustment, plaintiff sought an order of mandamus from this Court to compel ITA to make an immediate adjustment and predicated the Court's jurisdiction upon 28 U.S.C. § 1581(i). Defendants and the intervenor cross-moved for dismissal of the action on the grounds that the Court of International Trade

[1] Plaintiffs' counsel has been advised by ITA that Confecciones' certificates have been included in the current second administrative review under section 751.

lacked subject matter jurisdiction and that plaintiff had failed to state a claim upon which relief can be granted.

The cross-motion to dismiss for lack of jurisdiction was denied. While it was undisputed that the Court lacked subject matter jurisdiction under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c), section 1581(i) was held to be an appropriate basis for jurisdiction: "Since the contested ITA decision was made outside the scope of any administrative proceeding which ultimately would result in a determination reviewable under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c), obviously this is the circumstance in which Congress intended that the Court's residual jurisdiction could be invoked". 557 F. Supp. at 600.

Accordingly, in *Ceramica* this Court found that it had subject matter jurisdiction under section 1581(i) to determine whether ITA was authorized to adjust the countervailing duty deposit rate established by the final order prior to an administrative review under section 751. However, this Court went on to find that ITA lacks authority to modify the estimated countervailing duty cash deposit rate prior to and outside the scope of the administrative review provisions in section 751, and that consequently, the complaint failed to state a claim upon which relief could be granted.

Unlike the circumstances in *Ceramica* where, as noted above, plaintiff there sought an order compelling ITA to make an interim adjustment of a duty deposit rate prior to and outside the scope of the proceedings prescribed by section 751, here plaintiffs seek review of the final results of the first administrative review under section 751. I therefore conclude that plaintiffs' alleged aggrievance by the final results of the section 751 review falls within this Court's jurisdiction under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c).

Since plaintiffs' complaints state sufficient facts giving the Court jurisdiction under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c), the complaints are not "technically defective" under Rule 8(a) of the Rules of this Court, as claimed by defendants, for failure to specifically plead section 1581(c). *See City Federal Savings and Loan Association* v. *Crowley,* 393 F. Supp. 644, 650 (E.D. Wis. 1975); *James* v. *Ambrose,* 367 F. Supp. 1321, 1324 (D. St. Croix, Virgin Is., 1973).

Failure To State a Claim

Turning to the other branch of defendants' motions to dismiss—failure to state a claim upon which relief can be granted—we must observe the fundamental rule that for purposes of such motion, all relevant and material facts well pleaded in the complaint must be taken as true or admitted. 2A Moore's Federal Practice ¶1208, at 266 6,7 (2d ed. 1982); 35B C.J.S. *Fed. Civ. Proc.* § 854 (1960).

The complaints in the instant cases, contesting the final results of the first administrative review, allege *inter alia,* that during the period covered by the review Confecciones neither applied for nor received benefits under any of the Mexican Government's subsidy

programs, and hence Confecciones should have been included among the firms determined by ITA to have received a total bounty or grant of zero for the period in question. Continuing, the complaints allege that in accordance with the certification process, ITA received certificates pertaining to Confecciones from the Government of Mexico verifying that Confecciones neither applied for nor received benefits under any of the programs. Deeming the factual allegations of the respective complaints as admitted by defendants, I find that the complaints state a claim upon which relief can be granted. Since so far as the complaints are concerned, plaintiffs seek no relief outside the scope of the section 751 review, the present cases are plainly distinguishable from *Ceramica*.

For the reasons stated above, defendants' motions to dismiss are denied.

NOTICE

Defendants have not yet filed their answers to the complaints, and hence the cases are not at issue on the merits. Nevertheless, in the interest of completing the record and hopefully expediting the disposition of these cases for the sake of judicial economy, the Court has considered and will rule on the question of notice under section 751, well-briefed and skillfully argued by the parties.[2] On this aspect of the cases, plaintiffs contend that ITA failed to publish in the Federal Register notice of the initiation of the first section 751 review of the countervailing duty order on leather wearing apparel from Mexico, as required by the statute. Such procedural irregularity, plaintiffs insist, was substantial and prejudicial, with the result that the first administrative review is null and void with respect to plaintiffs.

Defendants do not dispute the statutory requirement for publication of notice in the Federal Register announcing the initiation of the first administrative review which commenced on April 19, 1982. However, defendants posit that such notice requirement was satisfied by ITA's statement of intent to conduct a review within 12 months of the order, which statement was included in the notice of the final affirmative countervailing duty determination and order published on April 10, 1981 (46 Fed. Reg. 21357).

I am unable to agree with defendants' contention. Not only is it inexplicable why a notice allegedly published in accordance with section 751 would be published one year and ten days in advance of the actual date of initiation of the review, a specific date of initiation was never noticed by the ITA. Obviously, a notice of intent to conduct an administrative review without indication of a specific date for initiation makes a mockery of the notice requirement of section 751. Moreover, it is not logical for interested parties to assume that a mere statement of intent to conduct a review at

[2] The Court wishes to express its appreciation to counsel for their cooperation and conducting these cases in the best traditions of our profession.

some unspecified time within twelve months constitutes the notice required by section 751.

The short of the matter is that defendants' construction of the statute, as requiring nothing more than notice of intent to conduct a section 751 review within twelve months, is palpably unreasonable and must be rejected.

Plaintiffs, who (according to an affidavit submitted to the Court) initially became aware of the first administrative review and ITA's certification methodology for a zero deposit rate shortly after publication on January 21, 1983 of the preliminary results (48 Fed. Reg. 2810), maintain that ITA's failure to publish notice of the initiation of the first administrative review is a substantial procedural irregularity and entirely prejudicial. Thus, argue plaintiffs, the results of the first administrative review are null and void respecting plaintiffs.

In *Woodrum* v. *Donovan,* 4 CIT —, Slip Op. 82-60, 544 F. Supp. 202 (1982), *rehearing denied,* 4 CIT—, Slip Op. 82-78 (1982), *decision on remand,* 5 CIT —, Slip Op. 83-43, 564, F. Supp. 826 (1983), *appeal pending,* relied upon by plaintiffs, Chief Judge Re held that the Secretary of Labor, in determining that plaintiffs were not eligible for trade adjustment assistance benefits under the Trade Act of 1974, failed to comply with the mandatory procedural requirements of the statute, including *inter alia,* publication of notice relative to receipt of a petition and initiation of an investigation. Chief Judge Re found that these procedural irregularities prejudiced the rights of the plaintiffs, and so far as pertinent to the present case, aptly stated (544 F. Supp. at 207):

> The facts of the present case indicate that the Secretary's failure to conduct an investigation or publish the required notices *did not serve the ends of justice, but only the administrative convenience of the agency.*
>
> When, as in the present case, agency action is taken without observance of procedure required by law, courts are empowered to set aside that action. Administrative Procedure Act § 706(2)(D), 5 U.S.C. § 706(2)(D) (1976). Nevertheless, as defendant correctly points out, courts will not set aside agency action unless the procedural errors complained of were prejudicial to the party seeking to have the action declared invalid. *John V. Carr & Son, Inc.* v. *United States,* 69 Cust. Ct. 78, 87, C.D. 4377, 347 F. Supp. 1390 (1972), *Aff'd* 61 CCPA 52, C.A.D. 1118, 496 F.2d 1225 (1974).
>
> The Secretary of Labor's failure to publish a notice and summary of his final determination in the Federal Register did not prejudice the rights of the plaintiffs in this action. Therefore, that error would not, by itself, compel the court to set aside the Secretary's determination. This cannot be said of the Secretary's failure to conduct an investigation, *and his failure to publish notice of the receipt of a petition. These procedural errors had the effect of excluding from the administrative record facts which are directly relevant to the Secretary's deter-*

mination that plaintiffs are not eligible for trade adjustment benefits. [Emphasis added.]

Analogous to the situation in *Woodrum*, the procedural error here by ITA in failing to publish a proper notice in the Federal Register prior to the initiation of the first administrative review resulted in substantial prejudice to plaintiffs, *i.e.*, the late filing and exclusion from administrative review of evidence directly relevant to Confecciones' zero benefit status. Absent publication in the Federal Register of the date that the first administrative review would be initiated, there were no other means prescribed by the statute for plaintiffs to have ascertained the actual date of the commencement of the first section 751 review. The statute places an explicit obligation on ITA to publish a notice in the Federal Register prior to initiation of an administrative review, but not an obligation on parties to make periodic inquiries of ITA as to whether an administrative review has commenced.

I find, that under the circumstances, plaintiffs exercised good faith in their efforts to comply with the certification procedures specified by ITA to obtain a zero duty deposit rate; and more, that plaintiffs were prejudiced by ITA's failure to publish a timely and proper notice of the initiation of the first administrative review. Despite plaintiffs' best efforts to comply with the certification process established by ITA, Confecciones' certificates failed to reach ITA via the Mexican Embassy in time for the first administrative review.[3]

Although section 751 itself dictates the general time-frame for conduct of the administrative review (*viz.*, at least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order), nevertheless, interested parties are not apprised by the statute itself as to a specific date for the initiation of a particular review. This circumstance was recognized by Congress in providing that an administrative review would be conducted "*after* publication of notice of such review in the Federal Register" (emphasis added). Therefore, published notice of the *specific date* for a commencement of an administrative review is vital to afford an opportunity for participation by all interested parties, and hence such published notice is mandated by the statute prior to the agency's initiation of the review proceedings.

As noted above, ITA failed to publish notice in the Federal Register regarding the specific date for commencement of the first administrative review, and as a consequence plaintiffs were preju-

[3] Defendants acknowledge that Confecciones' certificates submitted to ITA for the first administrative review were accepted by ITA for the second administrative review. Based on these same certificates, Confecciones has now been accorded "zero deposit rate status" in the second section 751 review as evidenced by the Notice of Preliminary Results (48 Fed. Reg. 43707 (1983)).

An indisputed affidavit by a certified public accountaint, submitted by plaintiffs, indicates that if Confecciones certificates are not considered by ITA in the *first* administrative review, the importer faces assessment of $169,216.18 in countervailing duties *notwithstanding* that the certificates indicate that Confecciones neither received nor applied for benefits under the Mexican subsidy programs.

diced by lack of proper notice. In *Woodrum*, wherein the failure of the Secretary of Labor to publish notice of receipt of a petition and the initiation of an investigation resulted in prejudice to plaintiffs, the matter was remanded to the Secretary for further proceedings. Here, Confecciones' certificates were received by ITA after publication of the final results of the section 751 review, and therefore the certificates are not technically part of the administrative record notwithstanding that they were transmitted by ITA to the Court as such. Defendants' observation that *de novo* review of countervailing duty proceedings is precluded under the Trade Agreements Act of 1979 is accurate. 19 U.S.C. § 1516a(b)(2).

In all candor, while the Court appreciates defendants' position to be that under section 751, ITA had no authority to consider Confecciones' certificates subsequent to publication of ITA's final results of the first administrative review, under all the facts and circumstances, the significant factor of lack of proper notice by ITA warrants remand at this juncture for ITA's consideration of Confecciones' certificates.

CONCLUSION

In summary, the Court of International Trade has subject matter jurisdiction under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c), and the complaints herein state a claim upon which relief can be granted. Further, ITA failed to publish prior notice of the specific date of the initiation of its first administrative review pursuant to section 751 of the subject countervailing duty order; and plaintiffs were prejudiced thereby, *i.e.*, exclusion of Confecciones' certificates from the final results of the administrative review published on March 31, 1983. Under the facts and circumstances herein, these matters will be remanded to ITA for its consideration of Confecciones' certificates, and for reconsideration of the final results of its administrative review under section 751.

Accordingly, it is hereby ORDERED:

1. That defendants' motions to dismiss are denied;

2. That these matters are remanded to ITA for further proceedings in connection with its administrative review of the countervailing duty determination and order conducted pursuant to section 751 covering imports of leather wearing apparel from Mexico (48 Fed. Reg. 13474 (March 31, 1983));

3. That within 30 days of the service of this order: ITA shall review as part of the administrative record in these matters the zero deposit rate certifications pertaining to Confecciones received by ITA on April 21, 1983 and any matters pertinent thereto; and ITA shall publish in the Federal Register supplemental final results of its administrative review published on March 31, 1983 (48 Fed. Reg. 13474). Certified copies of said supplemental final results shall be transmitted to the Clerk of the United States Court of International Trade and also shall be served upon plaintiffs.

4. That the temporary injunctions are extended to 20 days after final disposition by the Court following remand.

BERNARD NEWMAN,
Judge.

(Slip Op. 83-136)

MICHELIN TIRE CORPORATION, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 75-9-02467

Before WATSON, *Judge.*

Countervailing Duties—Valuation of Grants

The Court disapproves the use of an annuity calculation for expressing the benefit received from grants used to purchase capital assets. The Court approves the use of an interest factor in the calculation of the benefit received over the life of the assets. The Court finds error in the use of an interest factor which was not derived from a finding as to the particular circumstances of the beneficiary. The case is remanded for further proceedings.

[Remanded.]

(Decided December 22, 1983)

Windels, Marx, Davies & Ives (Paul Windels, Jr. and *John Y. Taggart* of counsel) for plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director Commercial Litigation Branch *(Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch; *Berniece A. Browne,* Senior Trial Counsel, Office of the Assistant General Counsel for Import Administration, U.S. Department of Commerce) for defendant.

Frederick L. Ikenson, P.C. *(Frederick L. Ikenson* of counsel) as *amicus curiae.*

WATSON, *Judge:* In this opinion the Court, for the third time, approaches the question of the valuation of certain cash grants received by Michelin Canada, a tire producer. These grants were part of the basis for the assessment of countervailing duties on x-radial steel belted tires produced by Michelin Canada and imported by plaintiff, Michelin Tire Corporation. In its first decision on the subject, the Court, among other things, found that the grants were no longer linked to the repayment of certain loans and therefore should not have their benefit allocated over the period of the loans. The Court remanded the question of the proper allocation period. *Michelin Tire Corp.* v. *United States,* 2 CIT 143 (1981). In the next opinion, the Court disapproved the method by which the International Trade Administration of the Department of Commerce (ITA) had allocated the face value of the grants over *half* the useful life of the assets which they were used to purchase. *Michelin Tire Corp.* v. *United States,* 4 C.I.T. — Slip Op. 82-115 (December 14, 1982).

The Court criticized the method as an arbitrary allocation of benefit. The Court remanded the matter again and spoke approvingly of a method which would recognize the time value of money over the life of the assets purchased. In the latest administrative determination the ITA has used a method which takes into account the time value of money. It incorporates this method into a calculation known as the present value of an annuity, a technique which has its most familiar use in the calculation of the standard home mortgage repayment schedule.

The Court, although it approves the recognition of the time value of money, finds the annuity method used by the ITA to be incorrect for use in the valuation of these grants. As will shortly be discussed, the method creates an imbalance between the real subsidy and the calculated subsidy in each year.

When the Court, in its last opinion, suggested reliance on accepted principles of accounting, or financial analysis, it did not expect to find a tailor-made formula for these particular investigative circumstances. It sought only such reasonable techniques as would accomplish the fundamental purposes of the law. These techniques cannot be allowed to cause significant deviations from the basic correspondence of the subsidy to the benefit. In these matters, the Court will continue to place its ultimate reliance on essential principles of reason and law, drawing on the special techniques of other areas only to the extent that they remain useful tools in the traditional, common-sense interpretation and application of the law.

The ITA determined what series of equal, annual amounts spread over the life of the assets purchased with the grant would yield a grand total equal to all the present values of the grant money if the grant was divided equally over the life of the asset, but expressed in each year as amounts whose future value is kept equal in real terms to the original present value by means of the addition of interest. In other words, it determined what the future value of the annual divisions of the money granted would have to be in order to maintain the complete present value of the grant and then divided that sum into equal portions over the life of the asset purchased with the grant.

This method can be expressed in the formula

$$PV=a\left[\frac{1}{(1+r)^{0}}+\frac{1}{(1+r)^{1}}+\frac{1}{(1+r)^{2}}+\ldots+\frac{1}{(1+r)^{n-1}}\right]$$

where "PV" equals the grant amount in the year of receipt and "a" equals the unknown amount of an annual annuity payment. Within the bracketed section each fraction represents one year's portion of the discounting of a series of payments as discounted in accordance with "r," the interest factor, over "n," the number of years. As written, each fraction can be viewed as showing the

annual reduction which occurs in a given sum if the interest rate contained in the numerator is assumed. The entire series of fractions provides a total of all the discounting that will occur during the time period in which receipt of benefits will occur. For a sum of benefits to retain the present value known and expressed as "PV" when divided over the years, it must equal the unknown "a" as multiplied or "affected" by the sum of the fractional reductions anticipated. The equation can then be solved for the unknown "a," which will be that equal annual amount, which, when subjected to the anticpated discounting expressed in the interest factor, has a present value in the amount desired—in this case the amount granted.

The method is criticized by plaintiff. Plaintiff first argues that the method should not have been adopted without compliance with the rule-making requirements of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* It also argues that the method is an unlawful, retroactive application of an administration rule.

Those arguments have no merit. This Court's Order of Remand set the terms for the ITA's determinations and did not require or contemplate rulemaking. The ITA's methodology arises from its investigative obligations in the particular case and need not be made the subject of a separate proceeding. See *NLRB* v. *Bell Aerospace Company,* 416 U.S. 267, 290–95 (1973). It need not be a continuation of previous administrative practices. In any event, the parties had a full opportunity to comment and provide information during the administrative proceeding. The substantive requirements of fairness have been satisfied.

With regard to the method itself, plaintiff criticizes the annuity technique as unlawfully and disproportionately offsetting the subsidy in the earlier years. The method is also criticized for overstating the interest rate used to maintain the value of the grant over the years, for failing to use the interest rate at the time of the drawdown of the funds, and for failing to take into account that aftertax benefits would tend to reduce the real rate of interest paid by a corporate borrower and should therefore reduce the rate of interest applied to the grant to maintain its value over the years. In general, plaintiff criticizes the method as leading to the assessment of duty on more than the face value of the grant, in violation of 19 U.S.C. § 1303 and in violation of Article 4.(2) of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (GATT).

Amicus criticizes the results but refrains from urging a further remand on the ground that its arguments could only result in the necessity for the determination of a higher rate of duty—the collection of which is barred in any event by case law. *Beacon Cycle and Supply Co.* v. *United States,* 81 Cust. Ct. 46, C.D. 4764 (1978).

Amicus' criticisms are directed to what are, in its view, harmless errors in the context of this proceeding, i.e., the failure of the De-

partment of Commerce to use realistic interest rates in its calculations and its failure to adopt a method which calculates the avoidance of future interest payments as a present benefit.

The Court finds it necessary to go forward to state its views with respect to the correctness of the ITA methodology because it cannot say with certainty that the faults it finds will result in an uncollectable higher rate of duty.

I

According to plaintiff, the time value of a grant, if it is to be calculated, should be done as if the portions of the grant allocated to future years (over the life of the asset they purchase) were earning interest until they materialized into the asset in the year of their allocation. Thus, the benefit is expressed as increasing amounts over the years in accordance with the effect of a prevailing compounded rate of return on the equal portions allocated to each year. The method preferred by plaintiff yields the following table for an example in which a $10,000 grant is used to purchase an asset with a life of ten years and $1000 of the grant is allocated to each of the ten years.

Table I

Year	Compounded rate of return	Amount to be countervailed
1	(1.1)0=1	$1,000
2	(1.1)1=1.1	1,100
3	(1.1)2=1.21	1,210
4	(1.1)3=1.331	1,331
5	(1.1)4=1.464	1,464
6	(1.1)5=1.611	1,611
7	(1.1)6=1.772	1,772
8	(1.1)7=1.949	1,949
9	(1.1)8=2.144	2,144
10	(1.1)9=2.358	2,358
Total		15,939

Plaintiff argues that on these terms a company would be indifferent to the receipt of the original total grant or the annual allocations of the grant amounts in each year, over the years. According to plaintiff this demonstrates that the full time value of the grant will be recaptured by this method and the company will receive no greater benefit from the original total than from the later allocations.

As will shortly be discussed in detail, the real benefit to the company is not an abstract investment which it could make at a prevailing rate of interest. The benefit of the grant is the elimination

of the costs of the commercial alternatives. The real question is to discover what would make a company indifferent to the opportunity to obtain capital assets for nothing. The plain answer is that only a method which applies to the gift the costs of the most likely commercial alternative can accomplish this purpose. That method must be one which approximates as accurately as possible the costs of the most likely alternative and, in attributing those costs to the grant, eliminates any direct preference which could exist between the grant and the alternative.

With this in mind, the Court turns to the two principal questions in the case, the ITA's use of an annuity method and the time value or interest factor which must be used in correctly valuing the grants in issue.

II

The method derived from the present value of an annuity is not in accordance with the law. It does not correspond to the subsidy benefit within the annual period most suited for the determination and assessment of countervailing duties. It does not accurately express the benefit in each year in the manner in which the genuine commercial alternatives available to a company would be expressed. In effect, it is an unjustified equalization of amounts which should be different in each year in accordance with the different effects which time has on the money granted and the different adjustments which have to be made to balance those effects over the time the grants are providing benefits.

The practical effect of the annuity method can be seen in the $10,000 example earlier discussed. The method used by the ITA[1] yields the amount of $1,480 to be countervailed in each of the 10 years, yielding a total of $14,800.

[1] The ITA calculation of the annual amount of countervailing duty is done as follows in accordance with the formula set out in the text of the decision.

Step 1 $10,000 $= \frac{X}{(1.1)^0} + \frac{X}{(1.1)^1} + \frac{X}{(1.1)^2} + \frac{X}{(1.1)^3} + \frac{X}{(1.1)^4}$

$\frac{X}{(1.1)^5} + \frac{X}{(1.1)^6} + \frac{X}{(1.1)^7} + \frac{X}{(1.1)^8} + \frac{X}{(1.1)^9}$

Step 2 $10,00 $= \frac{X}{1} + \frac{X}{1.1} + \frac{X}{1.21} + \frac{X}{1.331} + \frac{X}{1.4641}$

$\frac{X}{1.6105} + \frac{X}{1.7716} + \frac{X}{1.9487} + \frac{X}{2.1436} + \frac{X}{2.3579}$

Step 3 $10,000 = X + .9091X + .8264X + .7513X + .6830X + .6209X + .5645X + .5132X + .4665X + .4241X$

Step 4 $10,000 = 6.7590X$

Solution $1,480 = X

The Court understands the law to require a correspondence between the duty and the benefit, in accordance with the most likely commercial alternatives. The annuity formula does not accurately express the benefit in those terms. The fact that it may be easy to administer and understand does not overcome this basic flaw.

III

On the subject of the interest factor to be utilized in the calculation of the benefit the ITA has erred by deliberately trying to treat that important element of benefit in a neutral manner.

The benefits which must be withdrawn by payment of duty in the case of a subsidy are the benefits which result as a direct consequence of the subsidy. For a business, the direct consequences of receiving a gift of money normally are the elimination of the necessity of looking elsewhere for those funds and paying the price required by the alternative source of funds. The normal alternative sources of funding for business enterprises are two—the sale of shares in the business, carrying with it the obligation to share the profits, or the incurring of debt, carrying with it the obligation to repay the creditor with interest.

When a benefactor bestows a subsidy on a business, a fundamental and minimal part of the benefit is the elimination of the consequences to the beneficiary of the most likely alternative. In the case of a company with an ability to utilize alternative financing methods it will ordinarily be the duty of the administrative agency to determine, on the basis of the evidence, what alternative method would be used. In this case, which has been tried *de novo* by the Court, the Court finds from the evidence of record, that in the circumstances of Michelin Canada the alternative method of obtaining the funds in question would have been by debt financing.

The final question now turns to the interest factor used by the ITA in its attempt to incorporate the time value of money into its calculation of the subsidy. The basic flaw in the method used is the assumption that the movement of money through time is a neutral and abstract exercise in these matters. However, when properly viewed as a substitute for alternative methods of financing, the value of money given to a beneficiary is directly related to the cost of those alternatives to that particular beneficiary. To the extent that the grant relieves the beneficiary of the need to obtain alternative financing, it is the interest rate associated with that alternative which is the real and ascertainable benefit.

If this is not done, we have the unacceptable situation in which the effect of the most complete and generous form of subsidy—the outright grant—is measured by a looser standard than the less beneficient forms such as loans at preferential rates. A grant to a business is a gift which, in its very nature includes and surpasses the benefits of a preferential loan. The purity of the benefit bestowed by a grant should not immunize it from measurement in the most

reasonable commercial terms. This measurement must be specific for each recipient in order for it to be reasonable within the intendment of the countervailing duty law. See H.R. Rep. No. 96-317, 96th Cong., 1st Sess. 74,75 (1979).

The use by the ITA of a rate of interest derived from long-term Canadian government bonds was flawed and not in accordance with the law, because it was not based on a finding of fact that Michelin Canada would have had to pay that rate for alternative financing.

It is a countervailing duty law that we are interpreting and, in its very nature, it must focus on the effect of subsidies on particular beneficiaries. This is not a law in which basic differences between grant recipients can be overlooked or elided for the sake of administrative convenience. The value of money, expressed in terms of interest is too significant a part of a benefit to be homogenized for all beneficiaries.

Ordinarily, it will be the duty of the ITA to determine, on the basis of the evidence, what would have been the cost to the beneficiary of the most likely alternative—in this case, the interest rate for debt financing. Here, once again because the Court has tried this case *de novo,* the court decides one element of the interest rate determination based on the record, namely, that the alternative financing would have taken place in the Swiss bond market. The determination of the exact rate is left for the expertise of the ITA based on evidence which it has, or may obtain, regarding the interest terms which would been applied to the alternative financing.

When the interest rate on the alternative financing is applied to the grant in a manner which expresses the value of the grant over the years of its usefulness and maintains a correspondence to the benefit in each year, the statute will be satisfied.

At this point, the Court, based on the record in this case, including particularly the record on remand and the subsequent briefs, is finally in a position to determine a suitable method for valuation of the grants involved in this action.

The Court holds that for its purposes in deciding this action the correct method of valuing the subsidy provided by these grants is the following: The principal amount of the grant is allocated on a straight-line basis over the life of the asset it was used to purchase. To that amount in each year is added the interest expense in accordance with the interest which the beneficiary would have to pay on the remaining balance of the principal in accordance with the normal commercial financial practices. This method can be expressed in a formula as follows:

$$B = \frac{P}{n} + r\left[P - (x-1)\left(\frac{(P)}{n}\right)\right]$$

B is the amount of benefit which must be countervailed in a given year. That amount is equal to "P," the face amount of the subsidy divided by "n," the number of years over which the benefits of P will be experienced (yielding the annual amount of principal) *plus* the amount of "r," (interest) that would be owing on the principal not yet allocated, which unallocated principal is expressed as the original face amount "P," less the number of annual principal amounts

$$\frac{\text{"P"}}{\text{n,}}$$

times "x—1," the full years which have passed since the bestowal of the grant, ("x" being the year for which the calculation is being made).

This formula, although it does not achieve an Einsteinian simplicity, expresses the benefits in the most realistic possible commercial terms. It maintains a correspondence between the actual benefit and the amount to be countervailed at all points in the history of the benefit. It represents the fairest and most reasonable method of determining the benefit which flows from the grants involved in this action.

IV

The refinements in method which plaintiff would like to see, if indeed an interest factor is to be utilized, are not required by the law.

Plaintiff argues for the inclusion of after-tax considerations in the calculation of the subsidy. This would require a calculation of the tax deduction which would theoretically result from the payment of interest on alternative financing. That would reduce the cost of the alternative financing, reduce the benefit of taking a grant, and thereby reduce the subsidy. In short, plaintiff argues that the tax advantages of alternative debt financing ought to be considered to reduce the advantage which the outright grant bestows.

This argument cannot be accepted because it takes the administration of the law into the area of secondary effects. These effects are too uncertain to be considered a necessary part of a subsidy calculation in these circumstances. The Court notes that Michelin Canada paid no taxes during the period involved in this case.

Plaintiff also argues that the rate of interest should be determined as of the dates the money was actually received rather than the date of the agreements and further, that interest rate calculations should be made on a monthly rather than yearly basis. These are also matters which do not amount to requirements of the law. The date on which a party receives money has no particular relation to the time of measurement of its commercial alternatives and the interest rate attached to those alternatives. As for monthly in-

terest rates, the annual period can certainly be preferred for reference to transactions which are normally measured in annual terms. For transactions of these types a year is a normal and reasonable period of measurement.

Plaintiff claims that a method which goes beyond the face value of a grant violates the terms of the countervailing duty law, which in 19 U.S.C. § 1303 speaks of a duty "equal" to the net amount of the grant. Plaintiff also claims that the method violates the provision of GATT which makes it impermissible for a signatory to impose a countervailing duty in excess of the amount of the subsidy found to exist. Article 4.(2) of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT.

The Court does not read the language of the law or the international agreement as requiring that the valuation of subsidies be limited to their face value. On the contrary, the law and the international agreement obviously foresee a process of measurement.

No authority has been cited for the proposition that a grant whose benefit is to be experienced over a term of years is permanently fixed in the exact form and amount in which it is initially bestowed. The reality of financial experience is that money is affected by time and those methods which reasonably adjust to this commercial reality do nothing more than preserve and express the full meaning of the original financial transaction. For this reason the Court finds that a method of providing for the time value of money is in harmony with the law and with the relevant international agreements.

For the reasons expressed herein, and due to the possibility that the Court's decision may result in a reduction of the countervailing duty, this action is remanded to the ITA for further proceedings in accordance with this opinion. The parties are directed to confer with each other and attempt to agree on a schedule for proceeding on remand and for reporting the results to the Court. If the parties cannot reach agreement within 30 days the Court will order a schedule for further proceedings.

Dated: December 22, 1983, New York, New York.

JAMES L. WATSON,
Judge.

Decisions of the
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Abstracted Pro

The following abstracts of decisions of the United
published for the information and guidance of officers
decisions are not of sufficient general interest to print i
to Customs officials in easily locating cases and tracing i

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Protest Decisions

DEPARTMENT OF THE TREASURY, *December 22, 1983.*

ted States Court of International Trade at New York are
icers of the Customs and others concerned. Although the
int in full, the summary herein given will be of assistance
ing important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	AS
				Item N
P83/410	Newman, J. December 15, 1983	Hunter Douglas, Inc.	83-4-00543	Item 3 10¢ 21.6
P83/411	Boe, J. December 16, 1983	Formosa Plastics Group (USA) Inc.	81-7-00841	Item 3 6%
P83/412	Boe, J. December 16, 1983	Microma, Inc.	80-5-00826	Item 7 Vari duty 1¢ p at ra
P83/413	Rao, J. December 20, 1983	North American Foreign Trading Corp.	82-4-00530	Item 6 5% ((calc mac Item 7 75¢ or 6 14.8 port

ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
Item No. and Rate	Item No. and Rate		
Item 338.50 10¢ per lb. + 21.6%	Item 355.82 13.9%	Agreed statement of facts	Champlain-Rouses Point (Ogdensburg); New York Acrylic vanes
Item 355.81 6%	Item A771.42 Free of duty	U.S. v. Elbe Products Corp. C.A.D. 1267	Los Angeles Vinyl sponge leather
Item 720.75 Various rates of duty including 1¢ per piece or at rate of 22.5%	Item 685.90 8.5%	U.S. v. Texas Instruments, Inc. No. 81-23, 3/25/82	San Francisco Components of solid-state digital watches
Item 676.20 5% or 4.8% (calculating machines) Item 720.16 75¢ each + 16% or 69¢ each + 14.8% ("clock" portion)	Item 676.20 5% or 4.8%	Agreed statement of facts	New York Model LC 465 clock calculators

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DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION
R83/723	Re, C.J. December 15, 1983	Starlight Trading, Inc.	77-2-00163	Export value
R83/724	Watson, J. December 15, 1983	Hayim & Co., et al.	R61/14501, etc.	Export value
R83/725	Watson, J. December 15, 1983	The Nissho-American Corp. et al.	R59/19421, etc.	Export value

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S OF ATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
ue	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated
ue	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Wool and cotton rugs
ue	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Cotton clothing

R83/726	Watson, J. December 15, 1983	The Nissho-American Corp. et al.	R60/229, etc.	Export value
R83/727	Re, C.J. December 19, 1983	Armbee Corporation	75-01-00238	Export value
R83/728	Re, C.J. December 19, 1983	B & B Importing Co.	73-2-00537	Export value
R83/729	Re, C.J. December 19, 1983	D. B. Berleson & Co.	73-7-01725	Export value
R83/730	Newman, J. December 19, 1983	China Mercantile Co.	82-3-00399	Export value

F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Cotton clothing and wool sweaters
Appraised values specified on entry papers by liquidating officer, less additions included which reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Rubber bands
Appraised values specified on entry papers by liquidating officer, less additions included which reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Auto tape players, etc.
Appraised values specified on entry papers by liquidating officer, less additions included which reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Portland, Oreg. Not stated
Invoice unit price as entered	Agreed statement of facts	Los Angeles Footwear style Nos. JB 408 and JB 401

Appeals to U.S. Court of Appeals for the Federal Circuit

APPEAL NO. 84-679—SPEARHEAD INDUSTRIES, INC. v. THE UNITED STATES—INFLATABLE AIR CAP AND PONCHO CAPE—Appeal from Slip Op. 83-100, filed on December 1, 1983.

APPEAL NO. 84-692—FINAL DETERMINATION—ANTIDUMPING INVESTIGATION—SUGARS & SYRUPS FROM CANADA—TARIFF ACT OF 1930 AS AMENDED—Appeal from Slip Op. 83-103, filed December 15, 1983.

APPEAL NO. 84-693—TELEVISION RECEIVING SETS—MONOCHROME & COLOR—DUMPING FINDING—TARIFF ACT OF 1930, AS AMENDED—Appeal from Slip Op. 83-69, filed December 7, 1983.

APPEAL NO. 84-694—TELEVISION RECEIVING SETS—MONOCHROME & COLOR—DUMPING FINDING—TARIFF ACT OF 1930, AS AMENDED—appeal from Slip Op. 83-69, filed December 7, 1983.

Decision of U.S. Court of Appeals for the Federal Circuit

APPEAL NO. 83-1100—MIODRAG NIKOLIC v. THE UNITED STATES, ET AL.—CUSTOMHOUSE BROKER'S LICENSE—Appeal from Slip Op. 83-26 filed on June 1, 1983, decided on December 15, 1983.

U.S. Court of International Trade

Petition for Writ of Certiorari Filed With Supreme Court

(November 7, 1983)

APPEAL NO. 82-24—SMITH-CORONA GROUP v. UNITED STATES—Appeal from Slip Op. 82-34 filed May 13, 1982, Affirmed CAFC August 9, 1983, Supreme Court No. 83-766, filed November 7, 1983.

Court of Appeals for the Federal Circuit

Appeal No.

Sigma Instruments, Inc. v. The United States 83-1028

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